STATE OF MICHIGAN

COURT OF APPEALS

IRENE SMOKOSKA,

Plaintiff-Appellant,

v

GIBRALTAR TRADE CENTER NORTH, INC.,

Defendant-Appellee.

UNPUBLISHED
May 12, 2005

No. 252706
Macomb Circuit Court
LC No. 02-000214-NO

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

This premises liability case involves a "trip and fall" that occurred on defendant's premises. On appeal, plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition based solely on the open and obvious doctrine because the open and obvious doctrine does not affect plaintiff's negligent maintenance claim. We disagree.

A trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether the movant was entitled to judgment as a matter of law. *Id.*; *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Our review is limited solely to the evidence that was presented to the trial at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Plaintiff specifically relies on *Walker v City of Flint*, 213 Mich App 18, 21-22; 539 NW2d 535 (1995) to argue that "the defense of open and obvious danger relates to a claim of a duty to warn, but will not exonerate a defendant from liability where the claim is one of a duty to maintain and repair the premises." But, in *Walker*, the plaintiff's theory of liability was based on the highway exception to governmental immunity, which is a statutory duty. *Id.* at 21. Here, plaintiff's theory of liability is based on a common-law duty to maintain the premises; consequently, *Walker* is not applicable.

Also, since *Walker*, this Court has specifically rejected the argument that the open and obvious danger "doctrine applies only to claims of failure to warn and not to claims of failure to maintain premises." *Joyce v Rubin*, 249 Mich App 231, 236; 642 NW2d 360 (2002), citing *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 491, 495; 595 NW2d 152 (1999). *Millikin* involved a premises liability action in which the plaintiff was injured after tripping on a support wire that extended from the ground at the base of her home to a utility pole. The *Millikin* Court found that the open and obvious "doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability," including negligent maintenance of the premises. *Id.* at 497. The *Joyce* Court reaffirmed the holding in *Millikin*, finding it consistent with *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), and *Riddle v McLouth Steel Corporation*, 440 Mich 85; 485 NW2d 676 (1992), and held that "the open and obvious danger doctrine clearly applies to this case involving a common-law duty to maintain premises." *Joyce, supra* at 237. Accordingly, plaintiff's argument that the holdings of *Lugo*, *Bertrand*, and *Riddle* establish that the open and obvious doctrine does not affect her negligent maintenance claim is without merit. We hold that the trial court properly applied the open and obvious doctrine to plaintiff's negligent maintenance claim.

Additionally, plaintiff maintains that even if the open and obvious doctrine applies, the evidence that she was "distracted by goods on display" or that defendant should have anticipated the harm, remove this case from the open and obvious doctrine. Similar argument was raised in *Lugo* where our Supreme Court held, "While plaintiff argues that moving vehicles in the parking lot were a distraction, there is certainly nothing 'unusual' about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine." *Lugo, supra* at 522. Accordingly, we find that there was nothing "unusual" about the merchandise on display, and such proof does not remove plaintiff's case from the open and obvious danger doctrine. *Id.*

Next, plaintiff alleges that the trial court erred in holding that the defect was open and obvious as a matter of law. We disagree.

It is undisputed that plaintiff was a business invitee on defendant's premises. In general, as a possessor of land, defendant owes "a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id.* at 516. But this duty does not generally encompass removal of open and obvious dangers when "'the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them.'" *Id.*, quoting *Riddle, supra* at 96. The test for an open and obvious danger is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Joyce, supra* at 238, quoting *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court "looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Accordingly, regardless of whether plaintiff could have seen the uneven surface, the ultimate question is whether an ordinary person upon casual inspection could have discovered the uneven surface. *Id.* The evidence shows that the cause of plaintiff's fall was an approximately one-quarter to one-half inch raised or uneven concrete slab. The evidence also

shows that the raised or uneven surface was color marked. Frank Misch, defendant's security officer, investigated the incident and noted in his incident report that the raised area where plaintiff fell was an "orange marked area." Sam Samaha, who witnessed the incident, indicated that he saw "an old lady falling down pass [sic] the orange stripe with her hand on the floor." Furthermore, plaintiff admitted that the photographs she herself proffered showed yellow or pink paint in the area where she allegedly fell. Nevertheless, plaintiff testified she did not see the color difference at the time of her fall because her vision was diffused, and she usually could not tell the color difference. Viewing the above evidence in a light most favorable to plaintiff, we hold that the trial properly concluded that an average person of ordinary intelligence would have discovered the condition upon casual inspection. *Id.*

In addition, plaintiff failed to present any facts or argument that a "special aspect," such as a condition which is unavoidable or which poses an unreasonably high risk of severe injury, rendered the uneven surface unreasonably dangerous. *Lugo, supra* at 516-517. Only special aspects will serve to remove a condition from the open and obvious danger doctrine. *Id.* at 519. Here, plaintiff admitted in her deposition that instead of using the "F" aisle, she could have used dozens of ways to go from her booth to the manager's office. Unlike the example provided in *Lugo, supra* at 518, where a customer must walk over water to use the only exit of a building, plaintiff had a reasonable alternative to walking over the uneven surface. Also, unlike the example of falling into a thirty-foot hole in a parking lot in *Lugo, supra* at 518, the danger of tripping over the one-quarter to one-half inch raised or uneven surface did not pose an unreasonably high risk of severe injury. Also, plaintiff failed to support her assertion that the lights were "not that bright." Plaintiff never complained of the lighting to the management, and even if the area was dimly lit, the danger posed by the small rise in the concrete slab does not present a substantial risk of death or severe injury. Because the uneven surface was avoidable and did not pose an unusual hazard, we hold that the trial correctly found that plaintiff failed to establish a special aspect.

We further find that plaintiff mistakenly relies on *Abbott v Estate of Richard Abbott*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 2003 (Docket No. 234846), to argue that the evidence in this case creates a genuine issue of material fact regarding whether the defect was open and obvious. The unpublished opinion is not binding on this Court and the instant case can be distinguished from *Abbott.* The *Abbott* Court held that the trial court erred in finding an open and obvious condition based solely on the plaintiff's testimony that she was not looking where she was going instead of considering an eyewitness statement and an objective consideration of the condition of the premises. See *Lugo, supra* at 524. Here, the trial court did not make its finding solely on the fact that plaintiff was not watching where she was walking. Because the evidence, when viewed in the light most favorable to plaintiff, failed to create a question of fact regarding the open and obvious condition or the special aspect, the trial court properly found that the uneven surface causing plaintiff's fall was an open and obvious condition with no special aspects. Upon de novo review, we hold that the trial court properly granted summary disposition in favor of defendant.

We affirm.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Michael J. Talbot